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November 17, 2000

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

Dear Secretary Williams:

Enclosed for filing in STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, are the original and twenty-five copies of the Comments of Martin Marietta Materials, Inc. (MMM-1).

Also enclosed is a 3.5 inch IBM-compatible diskette convertible into WordPerfect 9.0 format with the text of the Comments.

Additional copies of this letter and of the Comments are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

If you have any question concerning this filing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,

Fritz R. Kahn

enc.
cc: Service list
Mr. Grant Godwin

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ORIGINAL

MMM-1

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS
OF
MARTIN MARIETTA MATERIALS, INC.

Fritz R. Kahn
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Attorney for

MARTIN MARIETTA MATERIALS, INC.

Due and dated: November 17, 200

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS
OF
MARTIN MARIETTA MATERIALS, INC.

Martin Marietta Materials, Inc., of Raleigh, North Carolina ("MMM"), pursuant to 5 U.S.C. 553(c) and 49 C.F.R. 1110.1, et seq., offers the following comments pertaining to the rules proposed for adoption by the Board's Notice of Proposed Rulemaking, served October 3, 2000:

MMM is the Nation's second largest producer of construction aggregates, supplying a full spectrum of aggregates — crushed stone, sand and gravel -- for highway building and maintenance, commercial and residential construction and numerous other uses. With over 300 quarries and distribution facilities in 28 states, MMM is strategically situated to assure its customers of quality products and superior services.

The aggregates business accounted for nearly ninety percent of MMM's 1999 revenues of $1.259 billion. The remainder of its earnings was derived largely from its magnesium specialities

division, a leading U.S. producer of magnesia-based chemical and refractory products used in a variety of industrial, chemical and environmental applications.

Rail translocation is a critical mode for extension of MMM's markets for its aggregates and its magnesia-based chemical and refractory products. Aggregates, of course, can be and are trucked in substantial quantities, but it is rare that aggregates can be trucked for more than 25 to 50 miles. Aggregates, also, can be barged, but only to customers with access to river or coastal port facilities. Thus, railroad transportation is critical for MMM to be able to sell crushed stone, sand and gravel at distances greater than 25 to 50 miles from its quarries. Railroad transportation also is essential for MMM to be able to ship lime feed product from its limestone processing plants in Ohio to its magnesia production facilities in Michigan. MMM rail shipments in 2001 are projected at 24 million tons.

Aggregates are among the lowest rated of the commodities handled by the railroads, traditionally carried in carload lots at a fraction of the railroads' first class rates. At the same time, railroad rates on crushed stone, sand and gravel are high relative to the delivered products' value, often being the largest single component of the delivered price of the products and in many instances exceeding the products' value at the quarry.

The railroads are free to set their rates at will, because the rail transportation of crushed stone, sand and gravel has

been exempted from regulation under subtitle IV of Title 49 of the U.S. Code.[1] That places a shipper of aggregates, such as MMM, in a perfectly untenable position, for the railroads are free to dictate the terms for their handling of its products on a take it or leave it basis. MMM is wholly without recourse in protecting itself from the railroads' pricing practices.

The only constraint upon the railroads' setting of rates on their aggregates traffic has been competition; however, as the Board, as well as the Interstate Commerce Commission before it, has approved the railroad mergers and acquisitions which have come before the agency, competition in the industry has all but disappeared. Each of MMM's quarries and stone crushing plants is served but by a single railroad, and, while some of its customers are located in markets served by a second rail carrier, that is irrelevant, for aggregates shipments as a practical matter cannot be interlined, particularly as an aftermath of the Board's Bottleneck decision.[2]

It is a matter of grave concern to MMM that the Board at the minimum preserve some semblance of intramodal competition by promulgating meaningful rules in the instant proceeding. The proposed rules, however, fall short of that objective for they contain no specific measures as to how the asserted goal of

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[1] Rail Exemption--Transp. Of Selected Commodity Groups, 9 I.C.C.2d 969 (1993).

[2] No. 41242, Central Power & Light Co. v. Southern Pac. Transp. Co., decided April 30, 1997, aff'd, MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), cert. den., 120 S.Ct. 372 (1999).

preserving and enhancing rail-to-rail competition is to be achieved; to MMM it appears that the Board has squandered an opportunity meaning fully to address the issue. To be sure, the Board goes to great lengths to pay lip service to preserving and enhancing competition in its approval of railroad mergers, as, for example, in the language of proposed §1180.1(c). The Board's proposed rules, however, establish no standards that future applicants must meet to preserve intramodal competition in gaining unconditional agency approval of their filings.

The unfettered discretion the Board reserves to itself as to how it will balance the alleged benefits of the railroads' future merger or acquisition proposals with the need for preserving or enhancing rail-to-rail competition renders it doubtful that the applications will be treated differently than the past ones have been. This uncertainty renders it likely that shippers, such as MMM, really won't know what the ground rules are until the next major railroad merger or acquisition proposal has been approved by the Board, and, of course, then it will be too late.

The Board in its Advance Notice of Proposed Rulemaking, served March 31, 2000, gave shippers, such as MMM, hope that the Board might revise its railroad merger rules to redress some of the wrongs shippers, particularly captive shippers, believe they heretofore have suffered, such as "requiring merger applicants to provide switching, at an agreed upon fee, to all exclusively served shippers located within or adjacent to terminal areas", "requiring merger applicants to offer, upon request, contracts

for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment", and "requiring merger applicants to provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment." None of these competition enhancing provisions, however, found its way into the proposed rules promulgated by the Board. Only bottleneck pricing was even mentioned, and the Board, in proposed §1180.1(c)(2)(i), left it to the applicants to explain how they anticipate affording affected shippers "the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement." It adds, "[W]e believe that it is appropriate to protect the ability of shippers to use a transportation contract obtained to a junction point to obtain a challengeable rate quote for transportation service provided beyond the junction points. These abstractions do nothing for shippers, for they already are free to negotiate rate agreements for the competitive portion of a through route; however, because of the ability of the bottleneck railroad to retaliate against the competing railroad in a situation in which their roles are reversed, such contracts are hard, if not impossible, to come by. The Board leaves up in the air what explanation offered by the applicants in support of their merger or acquisition proposal it will find to be acceptable or unacceptable. It might have been better in the

interest of enhancing or just preserving competition if the Board had promulgated a rule that in effect read:

> "Any merger or acquisition shall be conditioned to require the merged or controlled and controlling railroads to offer, upon request of a shipper, a contract for the competitive portion of an existing or potentially available through route whenever the merged or controlled and controlling railroads have a bottleneck segment unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

The Board's Notice of Proposed Rulemaking, as already noted, is completely silent with respect to the ability of a shipper served by a merged or controlled or controlling railroad to have access to a second carrier within essentially the same switching district or terminal area. Such terminal access, however, is essential if rail-to-rail competition is to be enhanced, as the Board insists is one of its objectives in revising its major merger rules. The Board well might have promulgated a proposed rule to read:

> "Any merger or acquisition shall be conditioned to require the merged or controlled and controlling railroads to provide reciprocal switching or switching at reasonable fees, to be agreed to by the parties or set by the Board, to any shipper seeking to be served

by another carrier within or proximate to the switching district or terminal area on the lines of the merged or controlled and controlling railroads unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

Indeed, the Board doesn't even propose adopting a rule that essentially codifies what has become the practice in recent major merger or acquisition proceedings,[3] namely, that any shipper which suffers a loss of actual or potential competitive railroad service as a result of the merger or acquisition shall be protected by the imposition of a condition affording trackage or haulage rights to another railroad to serve the affected shipper. Thus, a further rule to be adopted by the Board should read:

"Any merger or acquisition shall be conditioned to require the merged or controlled and controlling railroads to provide at reasonable charges, to be agreed to by the parties or set by the Board, trackage or haulage rights to another railroad so as to enable the other railroad to serve a shipper suffering a loss of actual or potential competitive railroad service as

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[3] See, Finance Docket No. 32760, Union Pacific Corporation, et al.--Control and Merger--Southern Pacific Rail Corporation, et al., served August 12, 1996, aff'd, Western Coal Traffic League v. Surface Transp. Bd., 169 F.3d 775 (D.C. Cir. 1999; Finance Docket No. 32549, Burlington Northern, Inc., et al.--Control and Merger--Santa Fe Pacific Corporation, et al., served August 23, 1995, aff'd, Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir 1997).

a result of the proposed merger or acquisition unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

MMM, moreover, would have hoped that in view of the widespread publicity in the trade press given to the substantial rate increases which have been announced by the Norfolk Southern Railway Company and CSX Transportation, Inc., since their division of the lines of the Consolidated Rail Corporation, the Board would have been persuaded not to permit the acquisition premium paid to effect a major railroad merger or acquisition to become a part of the merged or acquired railroad's rate base.[4] In effect, shippers, such as MMM, served by NS and CSXT, are bearing the cost of the railroads' irrational exuberance in bidding up the price of Conrail, for the railroads believe themselves entitled to earn a reasonable return on the inflated values assigned the merged or acquired properties. The Board's proposed rules, however, are silent in this regard, as well. MMM believes an appropriate rule to be adopted by the Board well might provide:

"Any merger or acquisition shall be conditioned so as to disallow the acquisition premium paid to effect the proposed transaction to be included in the merged or

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[4] See, STB Finance Docket No. 33388, CSX Corporation, et al. --Control and Operating Leases/Agreements--Conrail Inc., et al., served July 23, 1998, rev. pend. No. 98-4285, Erie-Niagara Rail Steering Comm. v. S.T.B. (2d Cir.).

controlled and controlling railroads' rate bases unless the applicants were able to prove by substantial evidence that the imposition of such a condition would be contrary to the public interest."

In sum, MMM urges the Board to reexamine its proposed rules for major railroad consolidations on the grounds that they are too vaguely worded, do little to correct the apparent pro-merger bent of the Board and offer shippers nothing in the way of reliable safeguards to preserve or enhance railroad competition.

Respectfully submitted,

MARTIN MARIETTA MATERIALS, INC.

By its attorney,

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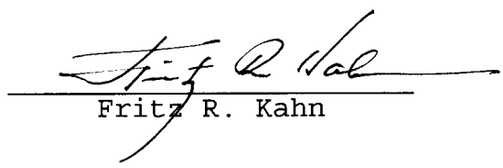
Due and dated: November 17, 2000

CERTIFICATE OF SERVICE

I certify that I this day have served copies of the foregoing Comments upon counsel for each of the parties by mailing them copies thereof, with first-class postage prepaid.

Dated at Washington, DC, this 17th day of November 2000.



Fritz R. Kahn